IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE MARTIN HILTI FAMILY TRUST,

Plaintiff,

-against-

KNOEDLER GALLERY, LLC, d/b/a KNOEDLER & COMPANY, ANN FREEDMAN, MICHAEL HAMMER, 8-31 HOLDINGS, INC., GLAFIRA ROSALES, JOSE CARLOS BERGANTINOS DIAZ, JESUS ANGEL BERGANTINOS DIAZ, PEI-SHEN QIAN, PER HAUBRO JENSEN, JAIMIE R. ANDRADE, and HAMMER GALLERIES, LLC,

Defendants.

13 CV 0657 (PGG) (HBP)

**ORAL ARGUMENT REQUESTED**

**MEMORANDUM OF LAW OF DEFENDANT HAMMER GALLERIES, LLC IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT**

Dated: August 15, 2014

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Defendant Hammer Galleries, LLC, submits this memorandum of law in support of its motion to dismiss all claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## INTRODUCTION

Plaintiff alleges one cause of action against Hammer Galleries, LLC ("Hammer Galleries") for unjust enrichment. Plaintiff fails to allege that any kind of relationship existed between Hammer Galleries and plaintiff – an essential element of an unjust enrichment claim -- or that any communication occurred between them. Plaintiff similarly fails to allege it acted at the behest of Hammer Galleries. The failure to plead these essential elements of unjust enrichment is fatal to plaintiff's claim against and the Amended Complaint should be dismissed against Hammer Galleries.

Even were the unjust enrichment claim adequately pleaded, it is barred by the applicable three year statute of limitations. Because plaintiff provided the purported benefit when it paid for the painting in 2002, the statute of limitations expired in 2005 and plaintiff's claim is untimely.

## FACTUAL ALLEGATIONS AGAINST HAMMER GALLERIES

The Amended Complaint contains no allegation identifying any act taken by Hammer Galleries, any communication between plaintiff and Hammer Galleries, or any relationship of any type between Hammer Galleries and plaintiff. In five conclusory statements, plaintiff alleges that Hammer Galleries was unjustly enriched when it received an unidentified amount of funds at some unidentified time from either Knoedler or 8-31. (Amended Complaint ("Compl.") ¶¶ 41, 269, 275, 276, 478.) The Amended Complaint does not identify when Hammer Galleries purportedly received the benefit or the amount of the benefit. Plaintiff does not allege that (a) any relationship ever existed between plaintiff and Hammer Galleries, (b) any communication ever occurred between plaintiff and Hammer Galleries, or (c) plaintiff did anything at the request of Hammer Galleries. Instead, plaintiff alleges that it communicated with Knoedler and Ann Freedman about the purchase of a painting from Knoedler. (*Id.* ¶ 1.) Plaintiff purchased the Work from Knoedler in 2002. (*Id.* ¶ 172.) Plaintiff alleges that it visited Knoedler and met with Ms. Freedman. (*Id.* ¶ 137.) Plaintiff asserts that Ms. Freedman and Knoedler made misrepresentations to plaintiff about the provenance of the Work. (*Id.* ¶¶ 141-152.) Knoedler purportedly made further representations when Per Jensen took the Work to plaintiff and in a telephone call by Ms. Freedman. (*Id.* ¶¶ 157-164.) Plaintiff claims that it purchased the Work because it "actually and justifiably relied on Knoedler's and Freedman's material misrepresentations" and "Knoedler's and Freedman's material omissions of fact." (*Id.* ¶¶ 407, 435.) Plaintiff fails to identify anything that it did in response to Hammer Galleries or because of a relationship or communication with Hammer Galleries.

## LEGAL ARGUMENT

### I. THE UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED BECAUSE NO RELATIONSHIP EXISTS BETWEEN PLAINTIFF AND HAMMER GALLERIES

For an unjust enrichment claim to survive, "there must be some relationship between the parties." *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 532 (S.D.N.Y. 2008) (dismissing unjust enrichment claim because plaintiffs did not have "any direct relationship . . . between themselves and any [defendant] entity" *id.* at 547); *see also Grynberg v. Eni S.p.A.*, 503 Fed. App'x 42, 44 (2d Cir. 2012) (summary order affirming summary judgment where district court held unjust enrichment "failed because [plaintiff] could not show any relationship, or even any communication, between" plaintiff and defendant); *U.S. E. Telecomms., Inc. v. U.S. W. Telecomms. Servs., Inc.*, 38 F.3d 1289, 1298 (2d Cir. 1994) (a party "may incur quasi-contractual obligations to a third-party with whom it has not contracted, by virtue of its direct representations to that party"); *Carmona v. Spanish Broad. Sys., Inc.*, No. 08-Civ.-4475, 2009 U.S. Dist. LEXIS 26479, at *18 (S.D.N.Y. Mar. 30, 2009) (Kaplan, J.) (dismissing unjust enrichment claim because "direct dealings or an actual, substantive relationship" must exist between the parties); *Abbatiello v. Monsanto*, 522 F. Supp. 2d 524, 542–43 (S.D.N.Y. 2007) (Marrero, J.) (dismissing unjust enrichment claim because no relationship existed between the parties); *Czech Beer Imps., Inc. v. C. Haven Imps, LLC*, No. 04 Civ. 2270, 2005 U.S. Dist. LEXIS 12310, at *24 (S.D.N.Y. June 22, 2005) (Casey, J.) (dismissing unjust enrichment claim because no "prior course of business dealings" existed between the parties). That such a relationship must exist between the plaintiff and the defendant in order to state an unjust enrichment claim "is beyond dispute." *Vertex Constr. Corp. v. T.F.J. Fitness L.L.C.*, No. 10-cv-683, 2011 U.S. Dist. LEXIS 135453, at *13 (E.D.N.Y. Nov. 23, 2011) (Amon, J.) (dismissing unjust enrichment claim).

No allegation exists that Hammer Galleries and plaintiff had any relationship or any communication. No allegation exists that suggests in any way that Hammer Galleries assumed any responsibility to pay plaintiff. Accordingly, the unjust enrichment claim should be dismissed.

## II. THE UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFF DID NOT ACT AT THE BEHEST OF HAMMER GALLERIES

"'[I]t is not enough that the defendant received a benefit from the activities of the plaintiff; if the services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.'" *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 329 (E.D.N.Y. 2005) (Amon, J.) (dismissing unjust enrichment claim) (quoting *Michele Pommier Models v. Men Women NY Model Mgmt.*, 14 F. Supp. 2d 331, 338 (S.D.N.Y. 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999)); *see also Ehrlich v. Froehlich*, 72 A.D.3d 1010, 1011 (2d Dep't 2010) (affirming dismissal of unjust enrichment because acts were not at the behest of the defendant); *Kagan v. K-Tel Entm't, Inc.*, 172 A.D.2d 375, 376 (1st Dep't 1991) ("[I]f services were performed at the behest of someone other than the defendant, the [person] must look to that person for recovery."). A plaintiff "cannot compel [a defendant] to compensate it . . . unless [plaintiff] engaged in the [beneficial actions] for the benefit of [defendant]." *Michele Pommier*, 14 F. Supp. 2d at 339. As the New York Court of Appeals has explained, an unjust enrichment claim requires proof of "a relationship between the parties that could have caused reliance or inducement." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y. 3d 173, 182 (2011).

No allegation exists that plaintiff did anything at the request of Hammer Galleries. In fact, plaintiff alleges that it acted because it "actually and justifiably relied on Knoedler's and Freedman's material misrepresentations" and "Knoedler's and Freedman's material omissions of fact." (Compl. ¶¶ 407, 435.) Accordingly, the claim should be dismissed.

## III. THE UNJUST ENRICHMENT CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

Plaintiff's unjust enrichment claim against Hammer Galleries was brought over seven years after the statute of limitations expired and is time-barred. Plaintiff filed this lawsuit over ten years after plaintiff purchased the purportedly forged painting from Knoedler that is the basis of this lawsuit. (Compl. ¶ 1.) The statute of limitations for unjust enrichment is three years when, as here, plaintiff seeks money damages (Compl. p. 76 ¶ Q). *See Ingrami v. Rovner*, 45 A.D.3d 806, 808, 847 N.Y.S.2d 132, 134 (2d Dep't 2007) (reversing trial court's refusal to permit defendant to add a statute of limitations defense because "the three-year statute of limitations ... governs here, since the plaintiff is seeking monetary, as opposed to equitable, relief"). The limitations period begins to run at the time of the "wrongful act" and "'not from the time the facts constituting the fraud are discovered.'" *Coombs v. Jervier*, 74 A.D.3d 724, 724, 906 N.Y.S.2d 267, 269 (2d Dep't 2010) (affirming dismissal of unjust enrichment) (quoting

*Reiner v. Jaeger*, 50 A.D.3d 761, 761, 855 N.Y.S.2d 613, 614 (2d Dep't 2008) (dismissing unjust enrichment claim because complaint did not allege facts of equitable tolling)). Plaintiff bought the purportedly forged painting on November 6, 2002. (Compl. ¶ 1.) Thus, plaintiff had to file an unjust enrichment claim by November 6, 2005. Plaintiff failed to file its lawsuit until 2013. Plaintiff's claim is time-barred as a result.

Apparently realizing this, plaintiff alleges that the statute of limitations was equitably tolled. (Compl. ¶ 482.) Plaintiff alleges that the limitations period on its unjust enrichment claim was equitably tolled by "the concealment of material facts." (Compl. ¶ 482.) Plaintiff does not identify any affirmative acts that Hammer Galleries or anyone else took to conceal material facts. (*Id.*)

Equitable tolling is narrowly applied and is reserved for "'rare and exceptional circumstance[]'" in which a party is "'prevented in some extraordinary way from exercising his rights.'" *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (citations omitted). "The burden of proving that tolling is appropriate rests with the plaintiff." *Danecker v. Board of Trustees*, 882 F. Supp. 2d 606, 612 (S.D.N.Y. 2012) (Engelmayer, J.) (dismissing claim because facts supporting equitable tolling not alleged). The Amended Complaint does not meet this burden.

"It is . . . fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit." *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006). In order to benefit from equitable tolling, a plaintiff is "required to show that [it] was induced to refrain from timely commencing an action due to defendant's affirmative wrongdoing." *Giarratano v. Silver*, 46 A.D.3d 1053, 1056, 847 N.Y.S.2d 698, 702 (3d Dep't 2007) (dismissing on summary judgment claims as untimely). "Equitable tolling 'is triggered by some conduct on the part of the defendant after the initial wrongdoing.'" *See De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 319 (S.D.N.Y. 2013) (Gardephe, J.) (quoting *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 491-92, 862 N.E.2d 189, 197-98, 836 N.Y.S.2d 509, 517-518, (2007)); *see also Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 789 (2012) ("there must be a 'later fraudulent misrepresentation ... for the purpose of concealing the former tort'") (quoting *Ross*, 8 N.Y.3d at 491-92). Silence or failure to disclose cannot be the basis for equitable tolling. *De Sole*, 974 F. Supp. 2d at 319 ("'[M]ere silence or failure to disclose the wrongdoing is insufficient.'" (quoting *Ross*, 8 N.Y.3d at 491-92)).

The Amended Complaint does not identify the kind of affirmative "later acts of deception by which the defendants concealed their wrongdoing" that is necessary to support equitable tolling. *See Corsello*, 18 N.Y.3d at 789 (quoting *Simcuski v. Saeli*, 44 N.Y.2d 442, 447 (1978)). In the related *Howard v. Freedman* action, this Court dismissed the breach of warranty claim because plaintiff in that case "alleges no facts indicating that Freedman and Knoedler prevented him from exercising his rights during the limitations period . . . [g]eneralized or conclusory allegations of fraudulent concealment are not sufficient to toll a statute of limitations." *De Sole*, 974 F. Supp. 2d at 319. Plaintiff does precisely the same thing in this case. It asserts that the claim was equitably tolled by "the concealment of material facts." (Compl. ¶ 482.) It alleges nothing more.

In essence, plaintiff is asserting that Hammer Galleries failed to disclose the purported unjust enrichment. That is not enough to equitably toll the running of the limitations period. *E.g., De Sole*, 974 F. Supp. 2d at 319 ("'[M]ere silence or failure to disclose the wrongdoing is insufficient.'" (quoting *Ross*, 8 N.Y.3d at 491-92)). The unjust enrichment claim should be dismissed as a result.

## IV. PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO REPLEAD

Plaintiff has had the benefit of complaints in the related *De Sole* and *Howard* actions that were amended after discovery, this Court's decision on defendants' motions to dismiss those actions, and full discovery. Plaintiff should not be allowed to replead its Amended Complaint. Plaintiff has already amended its complaint once after reviewing both the arguments that defendants raised in their initial pre-motion letters filed in May 2012, and this Court's reasoning in the decision on the *De Sole* and *Howard* motions to dismiss. Further, at a hearing on June 19, 2014, the Court inquired "having seen the arguments that defendants intend to bring in their motions to dismiss, do the plaintiffs intend to stand on their complaints in their present form or does anyone wish to amend before we go on with the motion practice?" Schmerler Decl. Ex. C at 5:9-14. The Court emphasized

> given the prior opinions I've issued and given the letters that defendants have submitted, plaintiffs should be in a pretty good position to analyze the merits of the proposed motions and whether their complaints do, in fact, have defects. And so it would be my expectation that any defects that are in the complaints would be addressed through amendment before we embark on a motion to dismiss practice.

*Id.* at 5:15-22. The Court went on to poll counsel for each of the plaintiffs as to whether they were "content to stand on [their] complaint in its present form or whether [they] wish[ed] to amend" and each of the counsel stated that the plaintiffs were "prepared to stand on their amended complaints." *Id.* at 5:23-6:17. Having chosen to do so, plaintiff should not be granted yet another opportunity to attempt to remedy the deficiencies in pleading.

## CONCLUSION

For the reasons stated, Hammer Galleries requests that the Court dismiss all claims asserted against it in the Amended Complaint with prejudice.

Dated: August 15, 2014

Respectfully submitted,

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